Supreme Court, U.S.
FILED
FEB 27 1979
MICHAEL RODAK, JR., CLERK

No. 78-625

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, PETITIONERS

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

LAWRENCE G. WALLACE
Acting Solicitor General

SANFORD SAGALKIN
Acting Assistant Attorney General

STEPHEN R. BARNETT
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND N. ZAGONE
DIRK D. SNEL
Attorneys
Department of Justice
Washington, D.C. 20530

WILLIAM M. NICHOLS
General Counsel

RICHARD M. IRBY
Assistant General Counsel
Office of Management and Budget
Washington, D.C. 20503

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	6
Argument:	
I. Section 102(2)(C) of the National Environmental Policy Act does not require federal agencies to prepare environmental impact statements in connection with annual budget requests for previously established federal programs	22
A. Annual budget requests by federal agencies to OMB and by OMB to the President are not "proposals for legislation" under Section 102(2)(C) of NEPA because until the President sends his budget to Congress there is no "proposal" within the meaning of that section	28
B. Requests for annual appropriations to support previously established federal programs are not "proposals for legislation" under Section 102(2)(C) of NEPA because appropriations are not "legislation" within the meaning of that section	34

Argument—Continued Page

1. Congress has traditionally distinguished between "legislation" and "appropriation," and all indications are that it did so in NEPA 34
2. Regulations adopted by the Council on Environmental Quality provide that requests for appropriations do not constitute "proposals for legislation" under NEPA 39
3. Application of the EIS requirement to requests for appropriations would be inconsistent with the effective preparation of the President's budget and would threaten the separation of powers 45

II. Section 102(2)(B) of NEPA does not impose a judicially enforceable obligation on OMB to promulgate guidelines directing other agencies to prepare environmental impact statements to accompany budget requests 55

Conclusion 62

CITATIONS

Cases:

Aberdeen & Rockfish R.R. v. *SCRAP*, 422 U.S. 289 ..... 14, 16, 54
Alaska v. *Carter*, 12 E.R.C. 1486 33
Aluli v. *Brown*, 437 F. Supp. 602 23

Cases—Continued Page

American Trucking Ass'ns v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 .. 44
Association of Data Processing Service Organization, Inc. v. *Camp*, 397 U.S. 150 60
Atchison, Topeka and Santa Fe Ry. v. *Callaway*, 431 F. Supp. 722 8
Automobile Club of Michigan v. *Commissioner*, 253 U.S. 180 44
Board of Governors v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978) 39
Chamber of Commerce v. *Department of Interior*, 439 F. Supp. 762 32
Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103 31
Chisholm v. *FCC*, 538 F.2d 349, cert. denied, 429 U.S. 890 44
City of New Haven v. *Chandler*, 446 F. Supp. 925 58
Crowell v. *Benson*, 285 U.S. 22 33
Ely v. *Velde*, 451 F.2d 1130 40
Environmental Defense Fund v. *TVA*, 468 F.2d 1164 ..... 11, 23
Environmental Defense Fund, Inc. v. *Corps of Engineers*, 492 F.2d 1123 58
General Electric Co. v. *Gilbert*, 429 U.S. 125 43
Greater Boston Television Corp. v. *FCC*, 444 F.2d 841, cert. denied, 403 U.S. 923 44
Greene County Planning Board v. *FPC*, 455 F.2d 412 40
Hanly v. *Kleindienst*, 471 F.2d 823, cert. denied, 412 U.S. 908 ..... 57, 58

Cases—Continued Page

Hiram Clarke Civic Club, Inc. v. *Lynn*, 476 F.2d 421 40
Kleppe v. *Sierra Club*, 427 U.S. 390..... 16, 19, 28, 31, 55
Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356 43
Natural Resources Defense Council, Inc. v. *SEC*, 389 F. Supp. 689 ..... 14, 54
Renegotiation Board v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168.. 50
Richmond Screw Anchor Co. v. *United States*, 275 U.S. 331 34
Saxbe v. *Bustos*, 419 U.S. 65 39
Scientists' Institute for Public Information v. *AEC*, 481 F.2d 1079 40
Sierra Club v. *Department of the Interior*, 424 F. Supp. 172 23
Sierra Club v. *Lynn*, 502 F.2d 43, cert. denied, 421 U.S. 994 40
Sierra Club v. *Morton*, 405 U.S. 727 13
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 ..... 60, 61
Skidmore v. *Swift & Co.*, 323 U.S. 134.... 44
Train v. *NRDC*, 421 U.S. 60 43
Trinity Episcopal School Corp. v. *Romney*, 523 F.2d 88 54
TVA v. *Hill*, 437 U.S. 153 ..... 34, 35
United States v. *American Trucking Ass'ns*, 310 U.S. 534 45
United States v. *Chemical Foundation*, 272 U.S. 1 59
United States v. *Dickerson*, 310 U.S. 554.. 34
United States v. *Rumely*, 345 U.S. 41 33
United States v. *Thompson*, 452 F.2d 1333 33

Cases—Continued Page

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 55
Warm Springs Dam Task Force v. *Gribble*, 417 U.S. 1301 43
Warth v. *Seldin*, 422 U.S. 490 61
Wingfield v. *OMB*, 9 E.R.C. 1961 ..... 8, 32

Constitution, statutes and regulations:

United States Constitution:

Article I, Section 8 49
Article II, Section 2 ..... 24, 32
Article II, Section 3 50

Act of August 25, 1958, Pub. L. No. 85-759, Section 1, 72 Stat. 852 38
Antiquities Act of 1906, 16 U.S.C. 431 33
Budget and Accounting Act, 1921, 31 U.S.C. 1 *et seq.*:

Section 2, 31 U.S.C. 2 ..... 2, 3
Section 201, 31 U.S.C. 11 .....30, 38, 51
Section 201(a), 31 U.S.C. 11(a)..... 18, 25, 29, 35, 49, 50
Section 201(a)(5), 31 U.S.C. 11(a)(5) 2, 3
Section 201(a)(12), 31 U.S.C. 11(a)(12) 36
Section 201(a)(12)(A)(B), 31 U.S.C. (a)(12)(A)(B) 36
Section 206, 31 U.S.C. 15 .....2, 3, 18, 23, 29, 50, 51, 52
Section 207, 31 U.S.C. 16....2, 4, 25, 26, 30, 50

ch. 18, 42 Stat. 22 25
Pub. L. No. 93-250, 88 Stat. 11.. 26

Section 215, 31 U.S.C. 23 .....2, 4, 26
Section 216(a), 31 U.S.C. 24(a) 2, 4

Constitution, statutes and regulations—Continued — Page

Budget and Accounting Procedures Act of 1950, ch. 946, Section 102(a), 64 Stat. 832 38
Commodity Futures Trading Commission Act of 1974, Section 101(9(A)), 7 U.S.C. 4a(h)(1) 53
Congressional Budget Act of 1974, Pub. L. No. 93-344, Sections 601-604, 88 Stat. 323-324 38
Congressional Budget and Impoundment Control Act of 1974, Section 2(5), 31 U.S.C. 1301(5) 39
Consumer Product Safety Act, Section 27 (k)(1), 15 U.S.C. 2076(k)(1) 53
Freedom of Information Act, 5 U.S.C. 552 *et seq.* 50
Pub. L. No. 93-502, 88 Stat. 1561 50
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*:
Section 102, 42 U.S.C. 4332 4
Section 102(2), 42 U.S.C. 4332(2) 31
Section 102(2)(B), 42 U.S.C. 4332 (2)(B) ..... *passim*
Section 102(2)(C), 42 U.S.C. 4332 (2)(C) ..... *passim*
Section 102(2)(C)(ii), 42 U.S.C. 4332(2)(C)(ii) 48
Section 102(2)(C)(iii), 42 U.S.C. 4332(2)(C)(iii) 48
Section 202, 42 U.S.C. 4342 ..... 40, 43
National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd *et seq.* 6

Constitution, statutes and regulations—Continued — Page

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, Section 311, 90 Stat. 60 (31 U.S.C. 11(j)) 53
Reorganization Plan No. 1 of 1939, 53 Stat. 1423 25
Reorganization Plan No. 2 of 1970, 84 Stat. 2085 26
18 U.S.C. 1913 35
22 U.S.C. 2394(c) 35
31 U.S.C. (1970 ed.) 1020 8
31 U.S.C. 1020 8
42 U.S.C. 2996f(c)(2)(B) 35
5 C.F.R. 1303.20(b) (1978) 51
40 C.F.R. (1977):
Section 1500.5 11
Section 1500.5(a)(1) 39
Section 1501.5(c) 58
Section 1501.5(e) 58
Section 1506.12 41
Section 1508.12 5
Section 1508.17 5
Miscellaneous:
7 *Cannon's Precedents* (1936) 35
59 Cong. Rec. (1920):
P. 7945 25
PP. 7947-7948 25
115 Cong. Rec. (1969):
P. 40424 37
PP. 40424-40427 37

Miscellaneous—Continued Page

Dawes, C., *The First Year of the Budget of the United States* (1923) 52
Deschler's Procedure (1974) 34
Executive Order No. 11514, 3 C.F.R. 902 (1966-1970 Compilation) 40
Section 3 40
Executive Order No. 11541, 35 Fed. Reg. 10737 (1970) 26
Executive Order No. 11991, 42 Fed. Reg. 26967 (1977) 41, 43, 57
Section 1 41
Section 2 42
40 Fed. Reg. (1975):
P. 54451 15
P. 55376 15
41 Fed. Reg. 53129 (1976) 15
43 Fed. Reg. (1978):
P. 25244 ..... 11, 42
P. 25245 ..... 11, 42
P. 55978 ..... 5, 11, 19, 41
P. 55978-56007 41
P. 55989 ..... 42, 44
P. 55993 58
P. 56002 41
P. 56004 ..... 5, 11, 19, 42
Fisher, L., "*Budget Concepts and Terminology: The Appropriations Phase*," in I Fund for Public Policy Research, *Studies in Taxation, Public Finance and Related Subjects—A Compendium* (1977) 35

Miscellaneous—Continued Page

Fisher, L., *Presidential Spending Power* (1975) 24, 26
General Accounting Office, Financial Management in the Federal Government, S. Doc. No. 92-50, 92d Cong., 1st Sess. (1971) 38
4 *Hinds' Precedents* (1907) 34
H.R. Rep. No. 362, 66th Cong., 1st Sess. (1919) 24
H.R. Rep. No. 91-378, 91st Cong., 1st Sess. (1969) 37
H.R. Rep. No. 91-765, 91st Cong., 1st Sess. (1969) 38
H.R. Rep. No. 91-1215, 91st Cong., 2d Sess. (1970) 36
H.R. Rep. No. 93-697, 93d Cong., 2d Sess. (1973) 26
Lawton, *Legislative-Executive Relationships in Budgeting as Viewed by the Executive*, 13 Pub. Admin. Rev. 169 (1953) 27, 49
Office of Management and Budget, Veto Message, S. Doc. No. 93-16, 93d Cong., 1st Sess. (1973) 26
Ott, J. & Ott, A., *Federal Budget Policy* (3d ed. 1977) 49
Polsby, N., *Congress and the Presidency* (2d ed. 1971) 49
Scheele, *President Carter and the Water Projects: A Case Study in Presidential Decision-making*, 8 Presidential Studies Quarterly 348 (1978) 30
S. Rep. No. 524, 66th Cong., 2d Sess. (1920) 25

Miscellaneous—Continued	Page
S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969)	37, 38
S. Rep. No. 93-579, 93d Cong., 1st Sess. (1973)	25, 27
S. Rep. No. 93-688, 93d Cong., 2d Sess. (1974)	49
S. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974)	51
Standing Rules of the Senate, Rule 16.4	34
The Budget of the United States Government, Fiscal Year 1980, Appendix (1979)	48
The Budget of the United States Government, Fiscal Year 1980, Part 7 (1979)	30
Wildavsky, A., *The Politics of the Budgetary Process* (1964)	27, 47, 49

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, PETITIONERS

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 581 F.2d 895. The opinion of the district court (Pet. App. 49a-58a) is reported at 395 F. Supp. 1187.

JURISDICTION

The judgment of the court of appeals (Pet. App. 59a-60a) was entered on May 15, 1978. On August 7, 1978, Mr. Justice Brennan extended the time with-

in which to file a petition for a writ of certiorari to and including October 12, 1978, and the petition was filed on that date. The petition was granted on January 8, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether annual budget requests by federal agencies to the Office of Management and Budget (OMB) and recommendations by OMB to the President, concerning items to be included in the President's Budget for the support of previously enacted federal programs affecting the environment, constitute "proposals for legislation" significantly affecting the quality of the human environment so as to require preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

2. Whether Section 102(2)(B) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(B), imposes judicially enforceable obligations on the Office of Management and Budget to adopt procedures and regulations to identify agency requests that must be accompanied by environmental impact statements.

STATUTES AND REGULATIONS INVOLVED

1. Budget and Accounting Act, 1921, As Amended

Sections 2, 201(a)(5), 206, 207, 215, and 216(a) of the Budget and Accounting Act, 1921, 31 U.S.C. 2, 11(a)(5), 15, 16, 23, and 24(a), provide in part:

SEC. 2. When used in this Act—

The terms "department and establishment" and "department or establishment" mean any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including any independent regulatory commission or board and the municipal government of the District of Columbia, but do not include the legislative branch of the Government or the Supreme Court of the United States; * * *.

SEC. 201. (a) The President shall transmit to Congress during the first fifteen days of each regular session, the Budget * * *. The Budget shall set forth in such form and detail as the President may determine—

* * * * *

(5) estimated expenditures and proposed appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year, and projections for the four fiscal years immediately following the ensuing fiscal year * * *.

* * * * *

SEC. 206. No estimate or request for an appropriation and no request for an increase in an item of any such estimate or request, and no recommendation as to how the revenue needs of the Government should be met, shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress.

SEC. 207. * * * The [Office of Management and Budget], under such rules and regulations as the President may prescribe, shall prepare the Budget, and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments.

SEC. 215. The head of each department and establishment shall submit his requests for appropriations to the Office of Management and Budget on or before a date which the President shall determine. In case of his failure to do so, the President shall cause such requests to be prepared as are necessary to enable him to include such requests with the Budget in respect to the work of such department or establishment.

SEC. 216. (a) Requests for regular, supplemental, or deficiency appropriations which are submitted to the Office of Management and Budget by the head of any department or establishment shall be prepared and submitted as the President may determine in accordance with the provisions of section 201.

2. National Environmental Policy Act of 1969

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides in part:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement by the responsible official * * *.

3. Regulations of the Council on Environmental Quality

Sections 1508.12 and 1508.17 of Title 40, Code of Federal Regulations, as adopted by the Council on Environmental Quality on November 29, 1978, state in part (43 Fed. Reg. 55978, 56004):

> § *1508.12 Federal agency.*
>
> "Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office * * *.
>
> * * * * *
>
> § *1508.17 Legislation.*
>
> "Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations * * *.

STATEMENT

1. In July 1974 the Sierra Club, the National Parks and Conservation Association, and the Natural Resources Defense Council (respondents) initiated this action against the Secretary of the Interior and the Director of the Office of Management and Budget (OMB) (A. 6).[1] Respondents are environmental organizations with a combined membership of approximately 200,000. They alleged that many of their members use the National Wildlife Refuge System, a network of more than 350 wildlife refuge areas, encompassing more than 30 million acres, administered by the Fish and Wildlife Service of the Department of the Interior.[2] Respondents alleged that their members are adversely affected in their use of the Refuge System by the environmental impact of proposals made by Interior and by OMB concerning the operation and maintenance of the System (A. 9-12, 95).

Respondents claimed that when Interior submits its annual budget for the Refuge System to OMB, and when OMB in turn recommends an annual level of funding for the System for the President to include in the Budget he submits to Congress, these communications are "recommendation[s] or report[s] on

[1] "A." refers to the appendix to the briefs filed in the court of appeals on March 19, 1976. By order entered February 21, 1979, respondents' motion to dispense with the filing of an appendix in this Court was granted.

[2] The Refuge System is administered under the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd *et seq.*

proposals for legislation * * * significantly affecting the quality of the human environment * * *" under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C) (A. 17). Therefore, respondents alleged, these budget communications must be accompanied by an environmental impact statement (EIS) as provided in that Section. Respondents alleged that no such environmental impact statements were prepared, and they sought a declaratory judgment requiring Interior and OMB to prepare, consider, and disseminate an environmental impact statement in connection with each annual budget request for the Refuge System. They also sought a declaration that, under Section 102(2)(B) of NEPA, 42 U.S.C. 4332(2)(B), OMB must establish formal methods and procedures to identify those submissions made by federal agencies during the budget process that must be accompanied by environmental impact statements (A. 18-20).[3]

In their answer to the complaint, OMB and Interior admitted that they had not prepared an environmental impact statement for any annual budget request they had made for the Refuge System. They maintained that Section 102(2)(C) of NEPA does

[3] An additional claim in the complaint was that Interior and OMB, without public notice, had made "major policy decisions" to cut back, curtail, and underfinance the operations of the Refuge System. Interior was accused of violating NEPA because it had failed to prepare an environmental impact statement to accompany its alleged adoption of this policy. Interior and OMB denied that such a policy had been adopted (A. 14, 20). The district court made no finding or ruling as to whether such a policy had been adopted.

not require agencies to prepare environmental impact statements in connection with annual budget requests or recommendations (A. 25).[4] They submitted affidavits, with attached exhibits, describing the numerous steps involved in the preparation of the President's annual Budget insofar as it relates to the Refuge System, the time constraints imposed by a process that must be repeated annually, the requirement of confidentiality, and the other conditions under which budget decisions are made within the Executive Branch (Pet. App. 63a, 73a; A. 95, 225, 264, 275).

Specifically, one of the affidavits, by Royston C. Hughes, Assistant Secretary of the Interior for Program Development and Budget, described the steps involved in preparing the budget request for the National Wildlife Refuge System for fiscal year 1975.[5]

---

[4] Petitioners did not argue in the courts below that there is no private right of action to enforce the requirement of Section 102(2)(C) that an EIS be prepared in connection with a "recommendation or report on proposals for legislation * * *." The issue is not jurisdictional, and we have not attempted to raise it in this Court. We note, however, that it is a question on which the lower courts have divided. Compare *Atchison, Topeka and Santa Fe Ry.* v. *Callaway*, 431 F. Supp. 722, 726-729 (D.D.C. 1977), with *Wingfield* v. *OMB*, 9 E.R.C. 1961, 1962-1963 (D.D.C. 1977). The issue may arise in future litigation under Section 102(2)(C) and can appropriately be addressed at that time.

[5] Fiscal year 1975 began July 1, 1974, and ended June 30, 1975. See 31 U.S.C. (1970 ed.) 1020. Beginning with fiscal year 1977, Congress altered the fiscal year to begin on October 1 and end on September 30. 31 U.S.C. 1020. The President's Budget is still submitted to Congress in early January of each year.

The Budget for that fiscal year was sent to Congress in January 1974. During the previous February, OMB issued to the Secretary of the Interior its tentative suggestion regarding the maximum appropriations level for the Department. The Secretary allocated the departmental total into "target budget amounts" for each agency and activity in the Department, and each Assistant Secretary and agency head was directed to prepare "program strategy papers" describing how they intended to meet the Secretary's "target budget amounts" in a manner conforming to departmental priorities and policies (Pet. App. 74a-75a).

In mid-May 1973, the "program strategy papers" were submitted to the Secretary. In July, the Assistant Secretary for Program Development and Budget submitted "secretarial issue papers" highlighting the choices and conflicts to be resolved by the Secretary among the various programs and activities competing for funding requests. Throughout July the Secretary conducted budget conferences with units of the Department, and in August he issued revised tentative allocations for new "target budget amounts." Heads of subordinate agencies, including the Director of the Fish and Wildlife Service, had opportunities to seek budgetary revisions by the Secretary until late August (Pet. App. 75a-76a).

In late September 1973, Interior's draft budget justifications were sent to OMB. Officials from OMB and Interior then conferred on several occasions over Interior's proposed budget and its justifications. After a personal review by OMB's Director, OMB in-

formed Interior in late November of the appropriation request for the Interior Department that OMB would recommend, in line with previously formulated presidential priorities, for presidential approval. Until late December, the Secretary of the Interior had the opportunity to appeal directly to the President for revision of the Department's budget allowance. The President also retained personal authority to revise the departmental budget request at any time before, or even after, its submission to Congress (Pet. App. 65a-66a, 76a-78a).[6]

When the President sent the Budget for fiscal year 1975 to Congress in January 1974, this was the first public announcement of requested appropriations for the Refuge System and all other federal programs. Before release of the Budget, under longstanding procedures, the amounts and nature of proposed appropriations under discussion remain confidential within the Executive Branch (Pet. App. 71a; see OMB Circular A-10, ¶ 3 (Rev. Jan. 18, 1964) (A. 225)).

OMB and Interior maintained that, in light of the short time periods within which budget decisions are made[7] and the requirement of confidentiality during the budget preparation process, it would be not only

[6] We are advised by Interior and OMB that no major changes have been made since fiscal year 1975 in the successive phases of budget-making for the Refuge System.

[7] The affidavit of Royston C. Hughes illustrates the time constraints involved. He notes that decisions on the Interior Department's proposed budget are not tentatively made until early December, are not finally made until late December, and are transmitted to Congress in mid-January (Pet. App. 78a).

impractical, but inconsistent with the nature of executive decisionmaking, to require the preparation of environmental impact statements for budget requests. They contended that nothing in NEPA should be understood to require this result.

2. The district court granted respondents' motion for summary judgment (Pet. App. 61a-62a). The court held that agency budget requests are "proposals for legislation" within the meaning of Section 102 (2)(C) of NEPA, and that OMB and Interior must therefore prepare, consider, and disseminate an environmental impact statement on every annual request or recommendation they make for funding the environmentally-significant Refuge System (Pet. App. 49a-52a). The court found support for its conclusion in the congressional objective of ensuring executive consideration of environmental values during the "constant revision and reevaluation of ongoing projects" (Pet. App. 50a, quoting *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1181 (6th Cir. 1972)).[8]

[8] The court further relied (Pet. App. 50a-52a) on guidelines adopted by the Council on Environmental Quality (CEQ) providing that agencies are to prepare environmental impact statements on "[r]ecommendations or favorable reports relating to legislation including requests for appropriations." 40 C.F.R. 1500.5 (1977). The court of appeals also gave weight to the CEQ guidelines (Pet. App. 6a n.8).

After the decision of the court of appeals, CEQ proposed to adopt regulations to amend this portion of its guidelines to provide that "'[l]egislation' * * * does not include requests for appropriations" (footnote omitted). 43 Fed. Reg. 25244, 25245 (1978). This regulation was adopted by CEQ on November 29, 1978, with an effective date of July 30, 1979. 43 Fed. Reg. 55978, 56004 (1978). The regulation is discussed at pages 39-44, *infra*.

The district court stated that since EIS preparation can begin before the request is made, "it is irrelevant that final budget decisions are presently made in a very short time frame" (Pet. App. 54a). The court said the effect of its decision would be limited because (*id.* at 55a) "[a]ppropriation proposals for most federal agencies would not appear to pose a threat to the environment and therefore no impact statement would be required." The court rejected the government's claim of confidentiality for appropriation requests and accordingly found no bar to requiring publicly disseminated environmental impact statements to accompany those requests (*id.* at 55a-57a). Finally, without discussion, the court ruled that Section 102(2)(B) of NEPA requires OMB "to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated" (Pet. App. 62a).[9]

3. On appeal, the District of Columbia Circuit first addressed the question of standing. The respondent organizations had submitted no affidavits or other evidence to support their allegations that their members used the Refuge System and were adversely affected by the environmental impact of budget re-

[9] In entering its declaratory order the district court also stated that it would award "injunctive relief" to respondents (Pet. App. 61a-62a). No injunction was in fact entered, however. Respondents have disclaimed any interest in obtaining injunctive relief, and the court of appeals treated the case as one involving declaratory relief only (*id.* at 2a, 3a).

quests for the System (Pet. App. 8a).[10] The court noted, however, that the government had not specifically contested respondents' allegations (*id.* at 9a). The court reasoned that since respondents could almost certainly show that at least some of their members use the Refuge System, they could satisfy the "minimal" standing requirements of *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972) (Pet. App. 8a). Hence, the government's "general denial" of standing did not require that a trial be held to resolve the issue (*id.* at 9a). The court added, however, that if a genuine issue of fact was raised concerning the use of the wildlife refuges by respondents' members, the government could contest the issue in appropriate proceedings on remand (*ibid.*).[11]

On the merits, the court of appeals agreed with the district court that Congress intended the EIS requirement of Section 102(2)(C) to apply to the budget preparation process (*id.* at 10a-14a). The

[10] Respondents also claimed standing on the basis of their asserted organizational interests in obtaining, evaluating, and disseminating the budgetary information concerning the Refuge System which they asserted that NEPA required the agencies to compile and disclose (Pet. App. 9a n.16). The court of appeals found it unnecessary to pursue this theory (*ibid.*).

[11] Judge MacKinnon stated in dissent that respondents should be required to demonstrate not only that their members use the wildlife refuges, but also that there is "a causal connection between the proposed appropriation [under consideration by Interior or OMB] and some identifiable decline in one of [their] members' use of a wildlife refuge" (Pet. App. 27a).

court of appeals concluded, however, that application of the EIS requirement to "every budget request for the annual operation * * * of an agency whose activities may have significant environmental impact" would "trivialize NEPA" (*id.* at 14a, 17a).[12] In order to provide "a limiting principle" (*id.* at 15a), the court concluded that the Act's reference to "proposals for legislation" should be understood to encompass proposals for "taking new action which significantly changes the status quo, not * * * a routine request for budget approval and appropriations for continuance and management of an ongoing program" (*id.* at 17a). In addition, even where there is no proposal to change the status quo, the EIS requirement would apply

> to those budget requests that follow or accompany an agency's painstaking review of an ongoing program. * * * Hence, a "proposal for legislation," within § 102(2)(C), is not applicable when the budget and appropriation process is routine, but is fully applicable when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review.

[12] Despite the district court's suggestion that its ruling would have only a limited effect, the court of appeals noted that the phrase "significantly affecting the quality of the human environment" in Section 102(2)(C) has received a broad application and could apply, for example, to activities of the ICC and the SEC (Pet. App. 14a n.27, citing *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320-321, 322-327 (1975), and *Natural Resources Defense Council, Inc.* v. *SEC*, 389 F. Supp. 689 (D.D.C. 1974)).

Pet. App. 17a & n.32. The court summarized this holding by stating that "an EIS is required when such a new look is had. * * * It is impossible to have a 'new look' at everything all the time. When there is such a new look the ensuing request for appropriations is a 'proposal for legislation' under NEPA" (*id.* at 18a).

Applying this "new look" principle to this case, the court observed that, subsequent to the decision of the district court, the Department of the Interior, in the exercise of its discretion, had completed a "programmatic EIS" for the Refuge System (*id.* at 18a).[13] The adequacy of this EIS as a long-term analysis of the environmental consequences of the proposed and alternative levels of funding for the System over the next decade was not challenged by respondents (*id.* at 19a).[14] The court accordingly held that "there is no further obligation under NEPA at this time" with respect to budget requests for the Wildlife Refuge System (*id.* at 23a), and it reversed the portion of the district court's judgment that directed Interior and OMB to prepare an EIS on each annual budget request for the System (*id.* at 19a).

[13] The draft environmental statement was issued in November 1975 (40 Fed. Reg. 54451, 55376-55378) and the final EIS, entitled *Final Environmental Statement: Operation of the National Wildlife Refuge System*, in November 1976 (41 Fed. Reg. 53129).

[14] The Department of the Interior indicated that it intended to update the programmatic EIS in the future to take account of altered plans or circumstances (Pet. App. 18a).

The court of appeals affirmed, however, the portion of the district court's order that directed OMB to develop formal methods and procedures to identify those agency actions that require environmental statements (*id.* at 20a-23a). The court held that NEPA requires OMB, "as the key agency in the executive's budget formulation process, to give appropriate guidance to the agencies" (*id.* at 20a). It indicated that such guidance was particularly important in view of the court's holding that some but not all budget requests constitute "proposals for legislation" under the Act (*id.* at 19a-20a). OMB was thus directed "to adopt procedures and appropriate regulations to comply with the obligations NEPA imposes on the budget process when it culminates in proposals for legislation under the principles previously discussed" (*id.* at 21a).

Judge MacKinnon dissented from the principal holdings of the court. He noted that under this Court's decisions in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 404 (1976), and *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320 (1975), as well as the language of the Act, the EIS requirement of Section 102(2)(C) becomes applicable only when a final "proposal" for federal action is made (Pet. App. 28a-30a). Since "in the budget-making process there is no final proposal until the President includes the item in his budget to Congress" (*id.* at 29a), the prior requests, recommendations, discussions, and negotiations concerning agency budget items within the Executive Branch are not final so as to be subject to the

EIS requirement. This conclusion is reinforced, Judge MacKinnon argued, by the confidentiality of the federal budget until it is released by the President. Preparation and publication of environmental studies on budget requests would interfere, in particular, with "the confidential nature of the communications between the President and units within the Executive Office" (*id.* at 45a).

Moreover, even if budget requests were "proposals" under the Act, they still would not be "proposals for legislation," Judge MacKinnon argued. Congress has traditionally distinguished between "legislation" and "appropriations," and Judge MacKinnon concluded that there was no reason to think that it departed from its customary usage here (*id.* at 31a-41a). Thus, agreeing with the majority that "it would be absurd to construe [NEPA] and its implementing regulations to require an EIS with each annual budget request," Judge MacKinnon found it "even more absurd—and equally contrary to the language of the statute—" to construe it to require the agency "to produce the half-way measure of a 'programmatic' environmental statement" (*id.* at 48a).

Finally, Judge MacKinnon disagreed with the majority's conclusion that Section 102(2)(B) imposes a duty on OMB to issue guidelines to federal agencies concerning their obligations, as declared by the majority, to prepare and publish environmental impact statements in connection with budget requests. To the extent that regulations governing environmental studies are required of agencies under the Act, Judge

MacKinnon found nothing to suggest that regulations adopted by agencies for their own use, such as those of the Department of the Interior, are not sufficient (*id.* at 46a-47a).

SUMMARY OF ARGUMENT

I

In enacting Section 102(2)(C) of NEPA to require federal agencies to prepare environmental impact statements in connection with "proposals for legislation," Congress did not make this requirement applicable to requests for annual appropriations made by federal agencies to OMB or to recommendations on such appropriations made by OMB to the President.

A. Even if it is assumed that appropriations constitute "legislation" within the meaning of NEPA (a proposition we challenge below), annual budget requests by federal agencies to OMB and by OMB to the President do not constitute "proposals" for such legislation. There is no "proposal" until the President submits the Budget to Congress.

In holding to the contrary, the court of appeals failed to consider that, under Section 201(a) of the Budget and Accounting Act, 1921, 31 U.S.C. 11(a), only the President is empowered to submit the Budget to Congress. When Congress enacted the Budget and Accounting Act, one of its principal objectives was to concentrate the political responsibility for preparing the national Budget in the President. Agencies were generally prohibited from submitting independent budget requests to Congress. 31 U.S.C. 15. Thus, funding requests within the Executive Branch are

tentative and provisional. They constitute part of the "germination process" of the President's budget proposal. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976). The agencies' budget requests to OMB as the President's delegate for budget preparation, and the recommendations of OMB to the President, do not constitute "proposals" within the meaning of NEPA, and the statute thus does not require that an EIS be prepared with respect to them.

B. Moreover, in enacting Section 102(2)(C) to require agencies to prepare an EIS in connection with "proposals for legislation," Congress did not intend the statute to apply to the budget process.

(1) Congress has traditionally distinguished between "legislation" and "appropriation" and does not use the former term to include the latter. Since the distinction between "legislation" and "appropriation" is deeply engrained in congressional usage, it is reasonable to infer that when Congress in Section 102(2)(C) used the term "legislation" with reference to its own activity, it intended to convey the meaning that it customarily gives that term. There is nothing in the history of NEPA to suggest a different intent.

(2) Regulations recently adopted by the Council on Environmental Quality confirm this understanding of the Act. They provide that the EIS requirement for "proposals for legislation" applies to "a bill or legislative proposal" but not to "requests for appropriations." 43 Fed. Reg. 55978, 56004 (1978).

(3) Application of the traditional distinction between "legislation" and "appropriation" yields a rea-

sonable statutory scheme. An environmental impact statement is required with respect to proposals for "legislation," such as the authorization of a new program, and an EIS is also required whenever specific proposed actions implementing such legislation will constitute "major Federal actions significantly affecting the quality of the human enviroment * * *." 42 U.S.C. 4332(2)(C). Construing Section 102(2)(C) to apply to "legislation," but not to "appropriations," avoids only the requirement of a third EIS review at the intermediate stage when annual budget requests to finance previously enacted legislation are formulated.

It is at least questionable whether there is sufficient time in the annual budget cycle for agencies to prepare adequate impact statements on all their appropriations requests that might affect the environment. More important, a requirement that an EIS be prepared by the agency at the time it submits its budget request would threaten the essential political discretion exercised by the President in the budget process by impairing the flexibility and confidentiality that the process requires.

(4) The court of appeals attempted to avoid some of these consequences by devising "a limiting principle" that would allow some application of NEPA in the budget process "[without] overburdening NEPA by spreading its mandate too widely" (Pet. App. 15a, 16a). The court thus held that an agency's budget request constitutes a "proposal for legislation" under NEPA only if it involves a "significant change" or

a "new look" at the agency's programs (Pet. App. 16a, 17a). The court's holding is vague and uncertain and lacks any foundation in the language or history of the statute. The "limiting principle" adopted by Congress in Section 102(2)(C) was to create an EIS requirement for "legislation" but not for "appropriation."

II

A. Even if we assume that Section 102(2)(C) requires agencies to prepare impact statements in connection with "some but not all" budget requests, as the court of appeals held (Pet. App. 19a-20a), the court erred in concluding that Section 102(2)(B) imposes an obligation on OMB to promulgate EIS guidelines for other agencies. Nothing in Section 102(2)(B) suggests that OMB is directed, or even authorized, to adopt procedures to guide other agencies concerning the independent responsibilities those agencies may have under Section 102(2)(C) to prepare environmental impact statements. The court of appeals erred in relying on the generalized language of Section 102(2)(B) to allocate to OMB a responsibility that Congress in Section 102(2)(C) expressly assigned to the individual agencies.

B. Moreover, respondents lack standing to claim that Section 102(2)(B) imposes a duty on OMB to issue guidelines to elaborate the asserted responsibility of federal agencies to prepare environmental impact statements during the budget process. Guidelines adopted by OMB would neither add to, nor detract from, the duty of each agency to prepare an EIS

when Section 102(2)(C) so requires. Any claim that respondents are injured by the absence of guidelines requiring agencies to do what (by hypothesis) they are already required to do by statute is based on "unadorned speculations" that do not suffice to invoke the federal judicial power.

ARGUMENT

I. SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT DOES NOT REQUIRE FEDERAL AGENCIES TO PREPARE ENVIRONMENTAL IMPACT STATEMENTS IN CONNECTION WITH ANNUAL BUDGET REQUESTS FOR PREVIOUSLY ESTABLISHED FEDERAL PROGRAMS

The court of appeals has held that annual budget submissions made by federal agencies to the Office of Management and Budget and by OMB to the President for previously established programs affecting the environment constitute "proposals for legislation" that must be accompanied by environmental impact statements under NEPA, though the court limited its holding to submissions that would "significantly change[] the status quo" or that reflect an agency's "new look" at a program.[15] This holding

[15] Although the court of appeals reversed the declaratory judgment of the district court requiring the Secretary of the Interior to prepare impact statements in connection with budget requests for the Refuge System, because of the EIS that the Secretary had voluntarily prepared (see page 15, *supra*), the Secretary, as well as the Director of OMB, retains a litigable interest in this case. The decision of the court of appeals, unless reversed, will require the Secretary to prepare additional impact statements in connection with budget requests "significantly chang[ing] the status quo" or reflecting a "new look" for both the Refuge System and other departmental programs. Moreover, the portion of the judgment that requires OMB to issue guidelines directing other agencies (including Interior) to prepare impact statements in connection with these classes of budget requests (see page 16, *supra*) constitutes an indirect imposition of this requirement on the Secretary.

marks the first significant judicial intervention in the processes of the Executive Branch that culminate in the President's annual submission of his Budget to Congress.[16] As we shall demonstrate, nothing in NEPA requires this result.

In order to place the discussion of NEPA in its proper context, we first describe the statutory and constitutional framework within which the President's Budget is prepared and submitted to Congress.

[16] Two other decisions have applied NEPA to the budget process. These cases have involved funding requests for discrete federal projects rather than an agency's general budget proposal for an entire program or activity. See *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1181-1182 (6th Cir. 1972); *Aluli* v. *Brown*, 437 F. Supp. 602 (D. Haw. 1977), appeal pending. Thus, even if it is assumed that those decisions are correct, the decision in this case is much broader. It potentially affects budget-making for the entire Department of the Interior and for all federal agencies and programs that might affect the quality of the human environment, since OMB has been directed by the court of appeals to issue guidelines to identify all federal budget proposals for which an EIS is to be prepared under the court's decision. In contrast, other courts have refused to impose procedural conditions or reporting or disclosure requirements on the budget-making process. *Sierra Club* v. *Department of the Interior*, 424 F. Supp. 172, 175 (N.D. Cal. 1976); *National Wildlife Federation* v. *United States*, Civil No. 78-1039 (D.D.C. July 20, 1978), appeal pending, No. 78-1976 (D.C. Cir.).

The President's authority to submit an annual Budget to Congress is part of his constitutional responsibility to "from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient" (U.S. Const. art. II, § 3). Throughout the nineteenth century the President did not ordinarily participate personally in the budget process, but left to each agency the responsibility for preparing and submitting appropriations requests. See H.R. Rep. No. 362, 66th Cong., 1st Sess. 3-4 (1919). As the number of federal agencies grew and the amount of federal spending increased, Congress became dissatisfied with the parochial approach often taken by individual agencies in submitting their budget requests and with the absence of direct presidential involvement in the budget process. Congress therefore enacted the Budget and Accounting Act, 1921, for the "primary purpose" of insuring that the President, rather than individual agencies, would be directly responsible for "the preparation and submission of the Budget" (*id.* at 6).[17] The House Report emphasized (*id.* at 5-6):

> [The President] is the only officer of the administrative branch who is interested in the Government as a whole rather than in one particular part. He is the only administrative officer who is elected by the people and thus can

[17] The President had, of course, directly participated in the submission of a proposed budget on many occasions prior to 1921. See generally L. Fisher, *Presidential Spending Power* 9-35 (1975).

> be held politically responsible for his actions. Furthermore, as head of the administration it is to him that Congress and the people should look for a clear and definite statement of what provision in his opinion should be made for the revenue and expenditure needs of the Government.

Thus, the objective of the Budget and Accounting Act is to insure that Congress has "before it the recommendations of the President in the form of a national budget" rather than "unrelated, and unrevised [estimates from individual agencies] representing the personal views and aspirations of bureau chiefs." S. Rep. No. 524, 66th Cong., 2d Sess. 6 (1920). See also 59 Cong. Rec. 7945, 7947-7948 (1920); S. Rep. No. 93-579, 93d Cong., 1st Sess. 6 (1973).

To accomplish this objective, Section 201 of the Act, 31 U.S.C. 11(a), directs the President to transmit the Budget to Congress at the beginning of each regular session. The Budget is to be prepared under the President's direction, and "under such rules and regulations as the President may prescribe." 31 U.S.C. 16. The President is assisted in this task by the Office of Management and Budget, which is part of the Executive Office of the President. Section 207, 31 U.S.C. 16.[18] Executive agencies are directed to

[18] The original version of the Act created the Bureau of the Budget, located then in the Treasury Department, to assist the President in preparing the Budget. Ch. 18, Section 207, 42 Stat. 22. In Reorganization Plan No. 1 of 1939, 53 Stat. 1423, the Bureau of the Budget was transferred from

submit departmental budget estimates to OMB rather than to Congress. Section 215, 31 U.S.C. 23. The intent of Congress to establish personal authority over the Budget in the President, and to bar individual agencies from dealing directly with Congress in the budget-making process, was made express in Section 206 of the Act, 31 U.S.C. 15, which provides that

> [n]o estimate or request for an appropriation * * * shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress.

---

the Treasury Department to the Executive Office of the President. In Reorganization Plan No. 2 of 1970, 84 Stat. 2085, the Bureau of the Budget was abolished and its budget-making functions were transferred directly to the President, who then delegated this responsibility to the newly established OMB. Executive Order No. 11541, 35 Fed. Reg. 10737 (1970). See also L. Fisher, *supra* note 17, at 46-51. This arrangement, with OMB performing budget preparation responsibilities as the President's delegate, has been retained. Congress enacted legislation in 1973 to vest the budget-preparation function directly in OMB by statute; however, the bill was vetoed by the President. See Office of Management and Budget, Veto Message, S. Doc. No. 93-16, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-697, 93d Cong., 1st Sess. 3 (1973). Congress amended Section 207 of the Budget and Accounting Act in 1974 to provide for Senate confirmation of the Director and Deputy Director of OMB. Pub. L. No. 93-250, 88 Stat. 11. In doing so, Congress disclaimed any intent to alter or redefine OMB's role as the President's delegate in performing budget-preparation responsibilities. H.R. Rep. No. 93-697, *supra*, at 1, 3. See also L. Fisher, *supra*, at 53-54.

Through his personal participation in preparing the Budget and transmitting it to Congress, the President provides the legislature with a comprehensive statement of the political objectives of his Administration. The President's Budget is "a bridge * * * between the legislative and the executive branches" for the communication of national political and social goals. Lawton, *Legislative-Executive Relationships in Budgeting as Viewed by the Executive*, 13 Pub. Admin. Rev. 169, 170 (1953). See also S. Rep. No. 93-579, *supra*, at 13-14; A. Wildavsky, *The Politics of the Budgetary Process* 4-5 (1964). Because the issues of policy that affect the President's budget decisions are inherently political in nature, freedom of communication within the Executive Branch is essential. Budget discussions within the Executive Branch are therefore conducted under a requirement of confidentiality. Budgetary material is not to be disclosed "in any form" prior to the President's transmittal of the Budget. OMB Circular A-10, ¶ 3 (Rev. Jan. 18, 1964) (A. 225).

The discussions and negotiations within the Executive Branch on preparation of the annual Budget take place under the severe time constraints that an annual process imposes. See note 7, *supra*. The final decision on appropriations to be requested in the Budget rests with the President. The heads of executive agencies often confer personally with the President on their agency's budget requests, and the President's final decision is often made less than a month before the Budget is transmitted to Congress. See pages 9-10, *supra*.

The decision of the court of appeals in this case construes NEPA to impose a requirement that is fundamentally incompatible with the time constaints, the need for political flexibility, and the tradition of confidentiality that characterize the budget-making process. By construing the statute in a manner that impinges on the President's effectiveness and freedom of action in preparing his recommendations on annual appropriations for submission to Congress, the decision assumes for the Judiciary an authority to regulate the internal decisionmaking of the Executive Branch and the communications between the Executive and Legislative Branches.

These results are unwarranted. As we shall show, in requiring federal agencies to prepare an EIS in connection with "proposals for legislation," Congress did not intend to apply this requirement to requests for annual budget allocations within the Executive Branch, and more generally did not intend to apply it to any requests for appropriations.

A. Annual Budget Requests by Federal Agencies to OMB and by OMB to the President Are Not "Proposals for Legislation" Under Section 102(2)(C) of NEPA Because Until the President Sends His Budget to Congress There Is No "Proposal" Within the Meaning of That Section

In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976), the Court held that Section 102(2)(C) of NEPA gives a court "no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination

process of a potential proposal" at which an impact statement must be prepared. Instead, "the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action.' *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 320 (1975) (*SCRAP II*) (emphasis in original)." 427 U.S. at 406.

In holding that "significant change" and "new look" budget requests by federal agencies to OMB and by OMB to the President constitute "proposals for legislation" under Section 102(2)(C) of NEPA, the court of appeals failed to consider that, under Section 201(a) of the Budget and Accounting Act, 1921, 31 U.S.C. 11(a), only the President is empowered to submit the Budget to Congress. Even if the Court were to conclude, contrary to our contention (Point I(B), *infra*), that congressional appropriations constitute "legislation" under NEPA, it is not until the President has submitted the Budget to Congress that such "legislation" has been "proposed."

When Congress enacted the Budget and Accounting Act, one of its principal objectives was to insure that only the President, and not individual agencies, would transmit budget proposals to Congress. See pages 24-25, *supra*. The agencies were generally prohibited from submitting independent budget requests to Congress, 31 U.S.C. 15, and their function in the budget process was limited to assisting the President in a confidential capacity in the development

of the President's Budget.[19] 31 U.S.C. 11, 16; OMB Circular A-10, ¶ 3 (A. 225). See pages 24-26, *supra*. Congress thus sought to concentrate the political responsibility for preparing a national budget for the President. 31 U.S.C. 11, 16.

As a result, agency funding requests to OMB, as well as the communications between OMB and the President, are tentative and provisional. The President retains personal authority to determine the appropriations to be requested in the Budget, and exercises discretion to defer or reformulate recommended decisions on particular budget requests. See *ibid.*; Scheele, *President Carter and the Water Projects: A Case Study in Presidential and Congressional Decision-making*, 8 Presidential Studies Quarterly 348 (1978). The agencies' provisional determinations thus may be revised "as a result of later Presidential decisions." *The Budget of the United States Government, Fiscal Year 1980*, Part 7, 339 (1979). As Judge MacKinnon observed in his dissent:

> the statutory and constitutional scheme governing the budget-making process make it clear that the task of submitting a proposed budget is solely a *presidential* responsibility. It is not until the President himself has acted that any budget request has been *proposed.*

Pet. App. 29a-30a; emphasis in original.[20] Agency funding requests constitute only predecisional recommendations that are part of the "germination process" of the President's budget proposal. See *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406.[21] Thus, the agencies' budget requests do not constitute "proposals" within the meaning of NEPA, and the statute does not require that environmental impact statements be prepared.[22]

---

[19] Congress has altered this practice only with respect to three specific agencies. See note 43, *infra*.

[20] The statutory and constitutional emphasis on presidential decisionmaking in the budget process is comparable to the provision for presidential review of certificates granted for overseas and foreign air transportation. As this Court observed in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 114 (1948):

> We conclude that orders of the [Civil Aeronautics] Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.

[21] The court of appeals attempted to distinguish this case from *Kleppe* by stating that *Kleppe* "was based on the finding that there was no program to analyze," whereas here the Refuge System is a federal program (Pet. App. 16a n.29). But the court, in quoting from one portion of the opinion in *Kleppe* (427 U.S. at 400-401), disregarded the subsequent portion of the opinion (*id.* at 404-406) in which this Court assumed "that a regional program was contemplated" (*id.* at 404) and held that the court of appeals had nonetheless erred in requiring that an EIS be prepared "at some point prior to the formal recommendation or report on a proposal" (*id.* at 404).

[22] Although the question is not presented here, nothing in NEPA would require the President to submit an EIS to Congress at the time the Budget is transmitted. The Budget is "proposed" at that time, but, as we argue below (pages 34-55, *infra*), the proposal is not for "legislation." In addition, Section 102(2) of NEPA, 42 U.S.C. 4332(2), applies only to "agencies of the Federal Government," and the Presi-

Any construction of NEPA that imposed procedural restrictions on the information the President may receive from executive agencies in the performance of his discretionary and political responsibilities for the Budget would pose constitutional difficulties. Article II, Section 2, Clause 1 of the Constitution provides that "The President * * * may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices * * *." When the President requests advice and recommendations of the executive departments with respect to the annual budget, it "would raise serious constitutional questions" under the Opinion Clause

> [f]or a court to require that an impact statement must be filed after the specified comment period before the President could receive the recommendations * * *. Applying the impact statement process to such recommendations necessarily burden and inhibit "the policy of open, frank discussion between subordinate and chief concerning administrative action." *Environmntal Protection Agency* v. *Mink*, 410 U.S. 73, 87 (1973), quoting *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (1958) (Reed, J.) [citations omitted].

Alaska v. *Carter*, 12 E.R.C. 1486, 1490-1491 (D. Alas. 1978).[23] A construction of NEPA creating this constitutional objection should be avoided, especially in the absence of any suggestion in the language or history of the Act that Congress intended such a result. *E.g.*, *United States* v. *Rumely*, 345 U.S. 41, 45 (1953); *Crowell* v. *Benson*, 285 U.S. 22, 62

---

dent is not an "agency." Most important, any construction of NEPA that sought to impose judicially enforceable limitations on the President's authority and ability to communicate budget requests to Congress would risk "breaching the separation of powers doctrine, and potentially infringing upon the President's constitutional power to present recommendations for legislation to the Congress." *Chamber of Commerce* v. *Department of Interior*, 439 F. Supp. 762, 767 (D.D.C. 1977); see *Wingfield* v. *OMB*, 9 E.R.C. 1961, 1963 (D.D.C. 1977).

This case also does not present the question whether an agency may be required by NEPA to prepare an EIS if, after the President's Budget has been proposed, the agency prepares a report or recommendation on the President's proposal. We note, however, that such a requirement does not exist if, as we argue below, requests for appropriations do not constitute proposals for "legislation" under NEPA.

[23] *Alaska* v. *Carter*, *supra*, involved the President's exercise of authority to withdraw public land in Alaska for public monuments under the Antiquities Act of 1906, 16 U.S.C. 431. The State contended (12 E.R.C. at 1490) "that the Secretary of Interior could not advise [the President] as to the proposed boundaries [of land to be withdrawn] or assist him in any way without triggering the impact statement process of NEPA." The court noted the constitutional difficulties of this proposed interpretation and stated (*id.* at 1491) that it would "avoid that interpretation absent a 'clear statement' of a contrary legislative intent," citing *United States* v. *Thompson*, 452 F.2d 1333, 1337 (D.C. Cir. 1971), and *United States* v. *Rumely*, 345 U.S. 41, 45 (1953). Since neither the statute nor its history reveals such an intent, the court held (12 E.R.C. at 1491):

> that any recommendations by the Secretary of Interior on the exercise of the President's powers under the Antiquities Act, which recommendations have been requested by the President, do not come under the NEPA impact statement process.

(1932); *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 346 (1928).

B. Requests for Annual Appropriations to Support Previously Established Federal Programs Are Not "Proposals for Legislation" Under Section 102(2)(C) of NEPA Because Appropriations Are Not "Legislation" Within the Meaning of That Section

1. Congress Has Traditionally Distinguished Between "Legislation" and "Appropriation," and All Indications Are That It Did So in NEPA

In enacting Section 102(2)(C) of NEPA to require agencies to prepare an EIS in connection with "proposals for legislation," Congress did not intend to impose an EIS requirement on the budget process. As Judge MacKinnon explained in his dissent (Pet. App. 30a-41a), Congress has traditionally distinguished between "legislation" and "appropriation" and does not use the former term to include the latter.

Legislation is the making of substantive rules, including authorization of new programs; appropriation is the funding of authorized programs. Thus, under the Rules of the House, "Language in [a general] appropriation bill changing existing law is legislation and not in order." Rule XXI, Clause 2, as stated in *Deschler's Procedure* 295 (1974); see also 4 *Hinds' Precedents*, Sections 3811-3812 (1907); Standing Rules of the Senate, Rule 16.4; *TVA* v. *Hill*, 437 U.S. 153, 190-191 (1978); *United States* v. *Dickerson*, 310 U.S. 554, 559 (1940).[24]

[24] Congress has emphasized the dichotomy between authorization and appropriation in its "tendency in recent decades to move toward annual authorization, requiring action each year by the legislative committees prior to passage of appropriation bills." L. Fisher, *"Budget Concepts and Terminology: The Appropriations Phase,"* in I Fund for Public Policy Research, *Studies in Taxation, Public Finance and Related Subjects—A Compendium* 436, 438 (1977). This bifurcated procedure stresses the distinct roles played by "legislation" and "appropriation"—which are, of course, the provinces of separate committees in each house.

Congress has frequently been confronted with the contrast between legislation and appropriations in its procedural rulings, and has maintained a sharp distinction in the usage of those terms. See, *e.g.*, 7 *Cannon's Precedents*, Sections 1172, 1410, 1443, 1445, 1448, 1454, 1459, 1463, 1470, 1472 (1936). Congress has also made the distinction in numerous statutes that refer separately to "legislation" and "appropriation." *E.g.*, 18 U.S.C. 1913 (proscribing the use of appropriated funds to influence any Congressman to favor or oppose "any legislation or appropriation"); 22 U.S.C. 2394(c); 42 U.S.C. 2996f(c)(2)(B). As this Court stated recently in *TVA* v. *Hill*, *supra*, 437 U.S. at 190: "We recognize that both substantive enactments and appropriations measures are 'Acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs."

The distinction Congress maintains between "legislation" and "appropriation" is reflected in recent amendments to the Budget and Accounting Act. Section 201(a) of the Act was amended in 1970 to provide that when "new or additional legislation which would create or expand any function, activity, or au-

thority, in addition to those functions, activities, and authorities then existing," is proposed, the Budget is to show "the amount proposed * * * for appropriation and for expenditure in the ensuing fiscal year on account of such proposal * * *." 31 U.S.C. 11(a)(12)(A)(B).[25] The statute thus distinguishes precisely between proposals for "legislation" and for "appropriation" to carry out the legislated authority. The House Report on this amendment underscores the distinction, pointing out that the President's annual State of the Union Message traditionally presents the President's "legislative proposals and programs" while "his subsequent budget message projects the necessary spending for these programs * * *." H.R. Rep. No. 91-1215, 91st Cong., 2d Sess. 12 (1970).[26]

[25] The statute similarly requires inclusion in the Budget of the "estimated appropriation required on account of such proposal in each of the four fiscal years, immediately following that ensuing fiscal year, during which such proposal is to be in effect * * *." *Ibid.*

[26] It is true that, as the amendment recognizes, new legislative programs to be proposed are indicated in the Budget itself, to provide a framework for presenting total estimates of projected government expenditures. However, the actual submission of such new programs for consideration on their legislative merits is invariably done separately from the Budget. At the time of this submission by the interested agency (after clearance by the President through OMB, see OMB Circular A-19 (Rev. July 31, 1972)), NEPA's requirement of an EIS may be applicable (a question not presented here). (Thus there is no danger, as respondents suggest (Br. in Opp. 11), that agency proposals for environmentally significant legislation would be generally exempt from NEPA on the ground that the final proposal was submitted to Congress by the President.)

Since the distinction between "legislation" and "appropriation" is so deeply engrained in congressional usage, it is reasonable to infer that when Congress in Section 102(2)(C) of NEPA used the term "legislation" with reference to its own activity, it intended to convey the meaning that it customarily gives that term.

There is nothing in the history of NEPA to suggest a different intent. There is no indication that Congress used the term "legislation" loosely as including requests for appropriation. In fact, silence concerning the budget-making process characterizes virtually the entire legislative history of NEPA. The process is not mentioned in either the House or Senate Reports or in the Report of the Conference Committee. H.R. Rep. No. 91-378, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-765, 91st Cong., 1st Sess. (1969).[27]

[27] When the conference report on NEPA was under consideration on the Senate floor, Senator Muskie, relying on written assurances from Senator Jackson, one of the conferees, stressed that recommendations by the President or by the Council on Environmental Quality "would be a vehicle for oversight hearings and hearings by the appropriate *legislative* committees of the Congress," 115 Cong. Rec. 40424 (1969) (emphasis added). The purpose of Senator Muskie's remarks was primarily to assure the Senate that NEPA's passage would not alter the jurisdiction of the various Senate committees. Senators Muskie and Boggs discussed the roles played by several legislative committees in environmental affairs (*id.* at 40424-40427). Neither the House nor Senate Appropriations Committees was mentioned as affected by, or concerned with, this legislation.

The impact statement requirement of Section 102 (2)(C) originated in the Senate (see H.R. Rep. No. 91-765, 91st Cong., 1st Sess. 8 (1969)), where it was characterized as a procedure requiring agencies to make "certain findings related to the environment" in their "legislative reports and recommendations for major Federal actions * * *." S. Rep. No. 91-296, *supra*, at 7. There is no suggestion here or elsewhere in the legislative history that budget-making procedures or agency budget requests to fund previously authorized programs were to be affected by this requirement.

Customarily, when Congress has desired the President to include additional information in the annual Budget, it has acted by amending Section 201 of the Budget and Accounting Act, 1921, 31 U.S.C. 11, which designates the contents of the Budget.[28] In 1974, in the most extensive revision of budgetary procedures since 1920, Congress substantially amended Section 201 by enacting the Congressional Budget Act of 1974, Pub. L. No. 93-344, Sections 601-604, 88 Stat. 323-324. The purpose of these amendments was to "provide for the furnishing of information by the executive branch in a manner that will assist the Congress in discharging its duties." Section 2(5)

[28] Prior to 1974, the major amendments to 31 U.S.C. 11 were made by the Budget and Accounting Procedures Act of 1950, ch. 946, Section 102(a), 64 Stat. 832, and by the Act of August 25, 1958, Pub. L. No. 85-759, Section 1, 72 Stat. 852. For a brief discussion of these and other amendments and their consequences, see General Accounting Office, Financial Management in the Federal Government, S. Doc. No. 92-50, 92d Cong., 1st Sess. 18-19, 45-54, 202-210, 214, 220-232 (1971).

of the Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. 1301(5). Notwithstanding that the President and federal agencies had not submitted environmental impact statements with the Budget during the intervening five years since NEPA had been enacted, the 1974 amendments were silent with respect to environmental impact statements and environmental data generally. The fact that Congress, obviously aware of the executive practice in this regard, said nothing in 1974 to require or even suggest that environmental data be submitted with the Budget supports the conclusion that Congress never intended such a requirement. See *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 14.

2. *Regulations Adopted By the Council on Environmental Quality Provide That Requests For Appropriations Do Not Constitute "Proposals For Legislation" Under NEPA*

In concluding that agency budget submissions are "proposals for legislation" subject to the EIS requirement of NEPA, the courts below noted that guidelines issued by the Council on Environmental Quality (CEQ) provided that an EIS should be prepared by agencies in connection with "[r]ecommendations or favorable reports relating to legislation *including requests for appropriations.*" 40 C.F.R. 1500.5(a)(1) (1977) (emphasis added). The court of appeals and the district court emphasized that the CEQ guidelines were entitled to significant weight as an aid to construction of the statute (Pet. App. 6a

n.8, 50a-52a). The court of appeals did not, however, regard the guidelines as controlling. Indeed, the court concluded that an EIS is not required for "requests for appropriations" unless a "significant change" or a "new look" at the agency's program is involved.

Whatever reliance the courts below may have placed on the guidelines, that reliance is no longer warranted. To the contrary, CEQ has now adopted regulations confirming that "proposals for legislation" do not include requests for appropriations.

a. CEQ was established by Congress in Section 202 of NEPA, 42 U.S.C. 4342, and was directed by the President in Executive Order No. 11514, § 3(h), 3 C.F.R. 902 (1966-1970 Compilation), to adopt guidelines to assist federal agencies in the preparation of environmental impact statements. While the guidelines have on occasion been held to merit considerable weight as an interpretation of NEPA, *e.g.*, *Scientists' Institute for Public Information* v. *AEC*, 481 F.2d 1079, 1088 (D.C. Cir. 1973); *Greene County Planning Board* v. *FPC*, 455 F.2d 412, 421 (2d Cir. 1972); but see *Sierra Club* v. *Lynn*, 502 F.2d 43, 58 (5th Cir. 1973), cert. denied, 421 U.S. 994 (1975), the guidelines have not been binding on federal agencies. *Ibid.*; *Hiram Clarke Civic Club, Inc.* v. *Lynn*, 476 F.2d 421, 425 (5th Cir. 1973); *Ely* v. *Velde*, 451 F.2d 1130, 1135-1136 n.14 (4th Cir. 1971).

In 1977, President Carter decided to replace the guidelines with a single set of uniform regulations setting forth the responsibilities of federal agencies in complying with the statute's requirements. The

President accordingly directed CEQ, in Executive Order No. 11991, § 1, 42 Fed. Reg. 26967 (1977), to

> [i]ssue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)).

The Executive Order provided that the regulations "shall be developed after consultation with affected agencies and after such public hearings as may be appropriate" (*ibid.*), and that upon their adoption the regulations would be binding on all federal agencies (*id.* § 2).[29]

After more than a year of study, including public hearings and analysis of public comments, the Council has issued final regulations that comprehensively revise the procedures federal agencies are to follow in performing their NEPA responsibilities. 43 Fed. Reg. 55978-56007 (1978).[30] In the revision most relevant to this case, Section 1508.17 of the regulations provides that the EIS requirement for "proposals for legislation" includes

> a bill or legislative proposal to Congress developed by or with the significant cooperation and

---

[29] Section 2 of the Executive Order directs federal agencies to "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements."

[30] Section 1506.12 of the regulations (43 Fed. Reg. at 56002) provides that the "effective date of these regulations is July 30, 1979," but that "nothing shall prevent an agency from proceeding under these regulations at an earlier time."

support of a Federal agency, *but does not include requests for appropriations.*

43 Fed. Reg. at 56004 (emphasis added).[31]

In adopting this revision, the Council stated that "traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors" indicated the inappropriateness of imposing an EIS requirement on requests for appropriations (43 Fed. Reg. at 55989). After several years of application of NEPA,[32] "the Council in its experience found that preparation of EISs is ill-suited to the budget preparation process" (*ibid.*).[33]

---

[31] The Council proposed the adoption of these regulations, including this particular revision, in June 1978 (43 Fed. Reg. 25244, 25245), subsequent to the decision of the court of appeals. At that time the Council noted (*id.* at 25245 n.1) that CEQ "in consultation with OMB had been prepared to propose this wording" before the decision of the court of appeals in this case, and invited "comment on the implications of [the] case" for the proposal. In adopting the final regulations in November 1978, CEQ noted that, after considering the comments it had received, it had "decided not to alter the scope of this provision." 43 Fed. Reg. at 55989.

[32] The Council noted that environmental reviews for appropriations requests "had not been conducted in the eight years since NEPA was enacted" (*ibid.*).

[33] However, the Council noted in the preamble to the regulations that "[n]othing in the Council's determination, however, relieves agencies of responsibility to prepare statements when otherwise required on the underlying program or other actions." 43 Fed. Reg. at 55989.

b. We asume that regulations issued by the Council under Executive Order No. 11991 will ordinarily be accorded substantial weight by the courts as administrative interpretations of the requirements of NEPA. CEQ was created by Congress to assist the President and the federal agencies in performing their responsibilities under NEPA. 42 U.S.C. 4342, 4332(2)(B); see *Warm Springs Dam Task Force* v. *Gribble*, 417 U.S. 1301, 1310 (1974) (Douglas, Circuit Justice). Moreover, the 1978 regulations, unlike the Council's previous guidelines, were expressly made binding on all federal agencies. Executive Order No. 11991, *supra*, at § 2. In view of the role assigned to CEQ by both Congress and the President in monitoring and implementing the requirements of NEPA, the informed judgment of the Council, as embodied in its regulations, should be accorded substantial weight in interpreting the Act. *Train* v. *NRDC*, 421 U.S. 60, 75 (1975); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

We recognize, however, that where, as here, the agency's current interpretation "contradicts the position which the agency had enunciated at an earlier date," *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976), this Court may subject the agency's current interpretation to greater than usual scrutiny. The Court has never held, however, that the first path chosen by an agency is the only path it may follow. The process of administration is a learning process, and "the thoroughness evident in [the

agency's] consideration, [and] the validity of its reasoning" (*ibid.*, quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)), can be enhanced as it develops experience through its implementation of the statute. Thus, the Court has held that an agency

> faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice.

American Trucking Ass'ns v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). Accord, *e.g.*, *Automobile Club of Michigan* v. *Commissioner*, 253 U.S. 180, 183 (1957); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 842 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); *Chisholm* v. *FCC*, 538 F.2d 349, 364 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976). As the Council observed when it adopted its new regulations in 1978 (43 Fed. Reg. at 55989), it is precisely the broad experience the Council has acquired in implementing NEPA that led it to conclude that the EIS requirement is inapplicable to the budget process.

It is not essential for the Court to define the precise degree of deference applicable to the Council's judgment in this regard. It is sufficient to note that the Council's regulation represents a construction of NEPA that is consistent with the language and history of the Act and with the statutory and constitutional context in which the Budget is prepared.

3. *Application of the EIS Requirement to Requests for Appropriations Would be Inconsistent With the Effective Preparation of the President's Budget and Would Threaten the Separation of Powers*

Application of the traditional distinction between "legislation" and "appropriation" in the context of Section 102(2)(C) yields a reasonable statutory scheme that avoids "absurd or futile results," *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). An environmental impact statement is required with respect to every proposal for "legislation," such as the authorization of a new program, and an EIS is also required whenever specific proposed actions implementing such legislation will constitute "major Federal actions significantly affecting the quality of the human environment * * *."[34] 42

---

[34] Respondents claim (Br. in Opp. 6-7 n.5) that agency budget requests may, in some contexts, be subject to the EIS requirement applicable to "proposals for * * * major Federal actions significantly affecting the quality of the human environment." As we have explained (pages 28-34, *supra*), this contention is unacceptable because the agency's submission of a budget request to OMB and OMB's submission to the President do not constitute "proposals" within the meaning of the statute. Moreover, while the majority did not directly rule on respondents' claim, Judge MacKinnon correctly observed in dissent (Pet. App. 42a) that annual budget requests made pursuant to "existing legislative authorization" are not proposals for "major Federal actions." If a planned expenditure is associated with some major implementing action —such as the construction of a dam—an EIS will be prepared for that project; it is the proposed project or action, not the appropriation, that may in some contexts constitute major federal action.

Respondents appear also to be suggesting (Br. in Opp. 6-7 n.5) that the budget request is itself a "major Federal

U.S.C. 4332(2)(C). Construing Section 102(2)(C) to apply to "legislation," but not to "appropriations," avoids only the requirement of a third EIS review at the intermediate stage when annual budget requests to finance previously enacted legislation are formulated.

The court of appeals correctly perceived that interpretation of Section 102(2)(C) to require preparation of an EIS in connection with agency budget submissions to OMB, as "proposals for legislation," would "trivialize NEPA" and reach "ridiculous extremes" (Pet. App. 17a, 22a-23a). Such an application of the EIS requirement would, moreover, be incompatible with the process by which the Budget is prepared.

a. It is at least questionable whether there is sufficient time in the budget cycle for each agency to prepare an adequate EIS on its appropriations re-

---

action" even if it is not a "proposal"—that is, that the language of Section 102(2)(C) should be read disjunctively as applicable to "proposals for legislation" on the one hand and to "other major Federal actions" on the other, rather than to "proposals for * * * other major Federal actions." See the opinion of the district court at Pet. App. 51a. This attempt to read the crucial term "proposals" out of the Act founders on the purpose, structure, and language of Section 102(2)(C), which goes on to state throughout its subparts that the EIS must relate to "the proposed action" or "the proposal." The "action" is never mentioned except in its "proposed" form, for the obvious reason that the Act was intended to bring environmental considerations into play *before* the action was taken.

quests.[35] The initial tentative guidance from OMB is received by each agency in February of each year; the tentative allocation of that total within the agency occurs in March; and the departmental submission to OMB is made in September (Pet. App. 74a-77a). If, for example, the Interior Department were required to submit an EIS at that time, it would have had approximately six months to prepare "a detailed statement" setting forth "the environmental impact" (42 U.S.C. 4332(2)(C)) of its proposed expenditures for the next fiscal year on every one of an enormous

---

[35] It is difficult to believe that Congress would have imposed such a burdensome requirement on an already over-burdened budget process without expressly saying so. The complexity of the process 15 years ago—when it was less complicated than it is now—was described in A. Wildavsky, *supra*, at 10, as follows:

> There are cases in which one might do better if one had endless time, and unlimited ability to calculate. But time is in terribly short supply, the human mind is drastically limited in what it can encompass, and the number of budgetary items may be huge, so that the trite phrase "A man can only do so much" takes on real meaning.
>
> * * * * *
>
> Aside from the complexity of individual budgetary programs, there remains the imposing problem of making comparisons among different programs that have different values for different people. This involves deciding such questions as how much highways are worth as compared to recreation facilities, national defense, schools, and so on down the range of governmental functions. No common denominator among these functions has been developed. No matter how hard they try, therefore, officials in places like the Bureau of the Budget discover that they cannot find any objective method of judging priorities among programs. How, then, do budget officials go about meeting their staggering burden of calculation?

variety of programs (see *The Budget of the United States Government, Fiscal Year 1980*, Appendix 537-614 (1979)). In preparing such statements the Department would be required to set forth, among other things, "any adverse environmental effects which cannot be avoided should the proposal be implemented" and "alternatives to the proposed action." 42 U.S.C. 4332(2)(C)(ii), (iii). Such an analysis could be achieved within the time constraints of the budget process only through Herculean labor, large staffing additions, or, as the court of appeals noted, trivialization of the process.[36]

Moreover, the requirement that an EIS be prepared by the agency at the time it submits its budget request to OMB would conflict with the political nature of the presidential budget process and impair the confidentiality the process requires. It has long been recognized that "[t]he size and shape of the budget is a matter of serious contention in our political life. Presidents, political parties, administrators, Congressmen, interest groups, and interested citizens vie with one another to have their preferences recorded in the budget. * * * In the most integral sense the budget lies at the heart of the political process." A.

[36] The difficulty of the task can be illustrated by the requirement that "alternatives to the proposed action" be considered. It is difficult to see how the agency could exhaust the reasonable "alternatives" to its budget submission; not only are different departmental budget totals an "alternative" to the submission, but there are innumerable variations on how each of the alternative totals could be allocated among departmental subdivisions and how each of the subdivisions could allocate their share among different program objectives.

A. Wildavsky, *supra*, at 4-5. See also page 27, *supra*.[37] Congress has been sensitive to the President's political role and need for flexibility in this process and has been sparing in its imposition of procedural and informational requirements, stressing that the process of preparing the Budget requires "cooperative efforts" between the President and the Congress.[38] Such cooperation involves the interaction of two fundamental constitutional responsibilities: that of the Congress to lay taxes and appropriate moneys (Art. I, § 8), and that of the President to recommend to Congress "such Measures as he shall judge necessary and

[37] "The focus of the budget preview process on program issues and analytical studies should not obscure the fact that budget making is and always will be a *political* process, and at the agency level the politics of budget making are important in several ways." J. Ott & A. Ott, *Federal Budget Policy* 31 (3d ed. 1977). See also, Lawton, *supra*, at 171-172; N. Polsby, *Congress and the Presidency* 110-129 (2d ed. 1971).

[38] The Senate Report on the 1974 amendments to Section 201(a) of the Budget and Accounting Act (see page 38, *supra*) stated (S. Rep. No. 93-688, 93d Cong., 2d Sess. 70 (1974)):

> The committee believes that reporting requirements should remain as flexible as possible and should be placed in statutory language only when absolutely necessary. The committee believes that the cooperative arrangement provided in title VIII can result in steady progress toward standardization and can facilitate continuing revision and modifications as congressional information needs change over the years. But it also should be clear that, whenever cooperative efforts prove unsatisfactory, Congress may enact such legislation as is necessary to ensure that congressional reporting requirements are met.

expedient" (Art. II, § 3). It would, at the least, raise questions concerning the proper separation of powers if Congress were to enact legislation restricting the President's ability to exercise his discretionary political judgment in the preparation of the presidential Budget. Far from evidencing any intent to do that, Congress has sought to concentrate that political discretion in the President by assigning to him the personal responsibility for transmitting the Budget and directing its preparation (31 U.S.C. 11(a), 16), and by generally prohibiting federal agencies from submitting independent appropriations requests to Congress (31 U.S.C. 15).

Application of the EIS requirement to agencies at the time they submit budget requests to OMB would threaten the essential political discretion exercised by the President in the budget process. Section 102(2)(C) of NEPA provides that copies of impact statements "shall be made available * * * to the public as provided by [the Freedom of Information Act, 5 U.S.C. 552]." It is our view, as discussed earlier (pages 30-31, *supra*), that an agency's budget submission to OMB is a "predecisional" document that is exempt from disclosure under the Freedom of Information Act. See *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975).[39] The

[39] When Congress extended coverage of the Freedom of Information Act in 1974 to "the Executive Office of the President," Pub. L. No. 93-502, 88 Stat. 1561, the Conference Committee Report noted that the term was "not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." S. Rep. No. 93-1200, 93d Cong., 2d Sess. 15 (1974). The regulations governing OMB, 5 C.F.R. 1303.20(b) (1978), state that certain units of OMB exist solely to advise the President and are thus exempt from the FOIA. OMB's budget preparation activites fall within this exemption (*ibid.*).

court of appeals concluded, however, that the agency's submission is a final "proposal for legislation" under NEPA and, as such, is subject to the public disclosure requirement (Pet. App. 22a).[40] This compelled disclosure of individual agencies' policy assessments and budget requests would fragment the development of the presidential budget in a manner contrary to the intention and requirements of the Budget and Accounting Act, 1921, 31 U.S.C. 11, 15. Indeed, it would tend toward the political fragmentation of the President's cabinet and Administration in a way that could fundamentally alter the President's role. By impairing the confidentiality of communications within the Executive Branch, this disclosure would injure the President's interest in speaking for his Administra-

[40] The court opined that the problem of disclosure "may be capable of resolution in a manner that presents program proposals in terms that permit an environmental analysis, without disclosure of dollar projections or other betrayal of genuine budget confidence" (*ibid.*). If the court was correct in concluding that agency budget submissions to OMB constitute final "proposals," its suggestion that the final EIS need not disclose the proposal and its alternatives is difficult to understand. In any event, even a limited disclosure of the kind discussed by the court would reveal independent agency policy assessments that are currently and appropriately withheld as confidential advice for the President.

tion, with a single voice, on the inherently political judgments expressed in the Budget.

These results were not intended by Congress in enacting NEPA. Congress was well acquainted with the tradition that agency budget requests remain confidential until the President transmits the Budget to Congress, and had itself enacted the prohibition in Section 206 of the Budget and Accounting Act, 31 U.S.C. 15, against disclosure to Congress or to congressional committees of an agency's appropriations request "unless at the request of either House of Congress." The practice of confidentiality in the presidential budget-making process has been confirmed in directives issued to agencies by OMB (and its predecessor, the Bureau of the Budget) since the 1930's (A. 225, 231, 242-243).[41] The current directive, OMB Circular A-10, ¶ 3 (Rev. Nov. 12, 1976) states (Pet. 19):[42]

> *Requirements for confidentiality prior to official transmittal.* The confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, since these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress. Presidential budget decisions are not final until the budget itself is transmitted to Congress. Amendments to the budget and supplemental appropriation requests may also follow the transmittal of the budget. Budgetary material should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

[41] Charles G. Dawes, the first Director of the Budget, emphasized in BOB Circular No. 49 (Dec. 19, 1921) the practice that agency budget requests were not to be submitted directly to Congress but only to the Bureau of the Budget and the President. C. Dawes, *The First Year of the Budget of the United States* 161-163 (1923).

[42] A prior, similar version of Circular A-10 is quoted in the dissenting opinion of Judge MacKinnon (Pet. App. 44a).

Congress has given attention to this practice on several occasions and has altered it only with respect to three specific agencies.[43] It is difficult to conceive that, in enacting the National Environmental Policy Act, Congress silently intended to undermine the confidentiality and reshape the character of the presidential budget process by compelling the public dissemination of individual agency budget requests, in conflict with longstanding administrative and statutory requirements.

b. The court of appeals recognized that, if every agency budget request were a "proposal for legislation" under NEPA, the statute would produce un-

[43] The Consumer Product Safety Commission, the Commodity Futures Trading Commission, and the Interstate Commerce Commission are required to submit their appropriations requests to Congress at the same time they submit them to OMB and the President. Consumer Product Safety Act, Section 27(k)(1), 15 U.S.C. 2076(k)(1); Commodity Futures Trading Commission Act of 1974, Section 101(9(A)), 7 U.S.C. 4a(h)(1); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, Section 311, 90 Stat. 60 (31 U.S.C. 11(j)).

workable results (Pet. App. 17a, 22a-23a).[44] The court therefore attempted to devise "a limiting principle" that would allow some application of NEPA in the budget process "[without] overburdening NEPA by spreading its mandate too widely" (Pet. App. 15a, 16a). The court concluded that, under a "rule of reason," an agency's budget request should be deemed a "proposal for legislation" under Section 102(2)(C) only when (1) the contemplated appropriation would "significantly change[] the status quo" or (2) "when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review" (Pet. App. 16a-17a). The court reiterated that "[w]hen there is such a new look [at the agency's program] the ensuing request for appropriations is a 'proposal for legislation' under NEPA" (*id.* at 18a).

The "limiting principle" adopted by the court of appeals is as uncertain as it is unsupported. The court of appeals' analysis provides sparse guidance to en-

[44] The district court suggested that its ruling would have only a limited effect because it would only apply to budget requests "significantly affecting the quality of the human environment" under Section 102(2)(C) (Pet. App. 55a). The court of appeals correctly observed, however, that this phrase has received a broad application and could apply, for example, to activities of the ICC and the SEC (Pet. App. 14a n.27) (citing *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320-321, 322-327 (1975), and *Natural Resources Defense Council, Inc.* v. *SEC*, 389 F. Supp. 689 (D.D.C. 1974)). See also, *e.g.*, *Trinity Episcopal School Corp.* v. *Romney*, 523 F.2d 88, 93 (2d Cir. 1975) (NEPA applicable to HUD projects and "quality of urban life").

able agencies and OMB to determine when a budget request contemplates action that "significantly changes the status quo," or when it involves a "new look" or "ushers in a considered programmatic course following a programmatic review" (Pet. App. 17a). The court's decision "would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decision making process of the agencies, and would invite litigation." *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406. Moreover, it has no foundation in the statutory language, resting instead on "a balancing of court-devised factors" comparable to the approach this Court rejected in *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406.[45] The "limiting principle" that Congress itself employed in enacting Section 102(2)(C) was to create an EIS requirement for "legislation" but not for "appropriations."

II. SECTION 102(2)(B) OF NEPA DOES NOT IMPOSE A JUDICIALLY ENFORCEABLE OBLIGATION ON OMB TO PROMULGATE GUIDELINES DIRECTING OTHER AGENCIES TO PREPARE ENVIRONMENTAL IMPACT STATEMENTS TO ACCOMPANY BUDGET REQUESTS

The court of appeals concluded that Section 102(2)(B) of NEPA, 42 U.S.C. 4332(2)(B), imposes a duty on OMB "to develop methods and procedures

[45] Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 549 (1978), where it was observed that a court has no authority to impose on agencies "its own notion of which procedures are 'best' or most likely to further some vague, undefined public good" (footnote omitted).

to implement the NEPA obligation to provide environmental impact statements to accompany those proposals on budget and appropriations that are proposals for legislation" (Pet. App. 23a). For the reasons set forth above, we submit that budget requests by executive agencies are not "proposals for legislation" under Section 102(2)(C) of NEPA and that neither OMB nor any other agency is thus required to prepare an EIS in connection with budget submissions. It follows that, contrary to the court's holding, NEPA imposes no duty on OMB to advise other agencies concerning their EIS responsibilities in the budget process.

But even if we assume that Section 102(2)(C) requires agencies to prepare impact statements in connection with "some but not all" budget requests, as the court of appeals held (Pet. App. 19a-20a), the court erred in concluding that Section 102(2)(B) imposes an obligation on OMB to promulgate EIS guidelines for other agencies.

A. Section 102(2)(B) provides that all federal agencies are to

> identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.

Nothing in this provision suggests that OMB is directed, or even authorized, to adopt procedures to

guide other agencies concerning the independent responsibilities those agencies may have under Section 102(2)(C) to prepare environmental impact statements.

Instead, Section 102(2)(C) itself provides that the EIS is to be prepared "by the responsible official" for the agency that makes a "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *." Thus, as Judge MacKinnon concluded in his dissent (Pet. App. 46a-47a), it is the Department of the Interior, not OMB, that is responsible under NEPA for determining when an EIS should be prepared in connection with any "proposals for legislation" made by that Department. See also *Hanly* v. *Kleindienst*, 471 F.2d 823, 828 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). The court of appeals erred in relying on the generalized language of Section 102(2)(B) to reallocate to OMB a responsibility that Congress in Section 102(2)(C) assigned to the individual agencies.

The entity Congress created to assist other agencies in implementing NEPA is, as Section 102(2)(B) itself recognizes, the Council on Environmental Quality, not OMB. See pages 40-43, *supra*. The Council's responsibilities have been further defined within the Executive Branch by Executive Order No. 11991, *supra*, directing CEQ to promulgate regulations to be followed by other agencies in the performance of their NEPA obligations. The Council's regulations provide that, when more than one agency is involved

in the development of a proposal, the agencies are to resolve between themselves which will be primarily responsible for the environmental inquiry. Section 1501.5(c), 43 Fed. Reg. at 55993. If the agencies fail to achieve agreement, they may apply to the Council to designate the agency to assume primary responsibility. Section 1501.5(e), 43 Fed. Reg. at 55993. The court of appeals' mandate to OMB to direct the performance of NEPA responsibilities by other agencies thus conflicts not only with the statute, but also with the reasonable procedures adopted by CEQ for resolving conflicts among agencies in the implementation of NEPA.[46]

Furthermore, Section 102(2)(B) has been held to require only "that some rudimentary procedures be designed to assure a fair and informed preliminary decision" on the environmental significance of proposed actions. *Hanly* v. *Kleindienst, supra*, 471 F.2d at 835. See also *City of New Haven* v. *Chandler*, 446 F. Supp. 925, 936 (D. Conn. 1978). The statute does not require an agency to adopt any particular procedural format, but only to make a "good faith attempt" to give appropriate consideration to environmental factors. *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 492 F.2d 1123, 1133 (5th Cir. 1974). If we assume arguendo that, as the court of appeals concluded, individual agencies are under an obligation to prepare an EIS in connection with "sig-

[46] As discussed *supra*, at pages 41-42, in issuing its regulations CEQ concluded that budget requests do not constitute proposals for legislation.

nificant change" or "new look" budget requests, OMB is entitled to rely on agencies to perform that responsibility in good faith.[47] There is no basis in Section 102(2)(B) for imposing on OMB an obligation to establish an additional layer of procedures directing the agencies to accomplish a responsibility which the court has held that they are independently required to perform.

B. For reasons similar to those just discussed, respondents lack standing to assert the claim they raise under Section 102(2)(B). The court of appeals did not consider separately the questions whether respondents have standing to sue under Section 102(2)(C) and Section 102(2)(B). The court concluded generally that if respondents' members use wildlife refuge areas that are alleged to be adversely affected by spending decisions for the Refuge System, they have standing in this case (Pet. App. 8a). We concede that members of the respondent organizations use wildlife refuge areas and that their use may be adversely affected by the environmental impact of decisions reducing the funds available for operation and maintenance of the Refuge System. Furthermore, when an agency fails to prepare an EIS that is required by Section 102(2)(C), and this failure leads to a governmental decision adverse to the environmental interests that NEPA is designed to protect, it would appear that the alleged injury

[47] Agencies are entitled to a presumption of regularity in their proceedings. *E.g., United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926).

"fairly can be traced" to the allegedly unlawful action. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 n.25 (1976). We therefore do not dispute that respondents have standing to claim that an EIS is required under Section 102 (2) (C) in the context of this case (though, of course, we dispute that claim on its merits).

Respondents do not have standing, however, to raise their claim under Section 102(2)(B). Respondents' claim is that Section 102(2)(B) imposes a duty on OMB to issue guidelines to elaborate the asserted responsibility of federal agencies to prepare and disseminate environmental impact statements during the budget process (Pet. App. 20a). But respondents cannot show, as they must, that OMB's failure to adopt such guidelines has "caused" another agency's failure to prepare an EIS in connection with its annual budget request. See *Simon*, *supra*, 426 U.S. at 45 n.25; *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

Guidelines adopted by OMB would neither add to, nor detract from, the duty of each agency to prepare an EIS when Section 102(2)(C) so requires.[48]

[48] Respondents suggest (Br. in Opp. 16 n.15) that, if OMB had issued guidelines informing agencies of their obligation to submit an EIS in connection with budget requests, "there can be little doubt" that agencies would have complied. This suggestion is circular. If agencies are required under Section 102(2)(C) to submit an EIS with their budget requests, advice to the same effect from OMB would be unnecessary and would add nothing.

Any claim that respondents are injured by the absence of guidelines requiring agencies to do what (by hypothesis) they are already required to do by statute is based on the mere speculation that, without such guidelines, agencies would ignore their independent responsibility under Section 102(2)(C). Respondents' theory of injury is at odds with the customary rule that agencies are entitled to a presumption of regularity in their proceedings. See note 47, *supra*. Respondents' "unadorned speculation[s]" do not "suffice to invoke the federal judicial power." *Simon*, *supra*, 426 U.S. at 44. See also *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General *

SANFORD SAGALKIN
Acting Assistant Attorney General

STEPHEN R. BARNETT
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND N. ZAGONE
DIRK D. SNEL
Attorneys

WILLIAM M. NICHOLS
General Counsel

RICHARD M. IRBY
Assistant General Counsel
Office of Management and Budget

MARCH 1979

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 287926 351